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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SAVOEUN SOEUR, Defendant and Appellant.	B270124 (Los Angeles County Super. Ct. No. NA073193)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Conditionally vacated and remanded with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Savoeun Soeur appeals from a judgment entered after a jury found him guilty of two counts of first degree murder and one count of premeditated attempted murder, and further found special circumstance, gang and firearm enhancement allegations to be true. The trial court sentenced him to life without the possibility of parole for the murders. We reject Soeur's contentions of reversible error affecting the jury's verdicts. We conditionally vacate the judgment and remand the matter for reconsideration because the record does not demonstrate that in sentencing Soeur, a juvenile offender who was 17 years old at the time of the crimes, the trial court gave due consideration to whether his crimes reflected transient immaturity or irreparable corruption.

BACKGROUND

In 2010, Soeur was tried for these murders and attempted murder, along with codefendants Ratanak David Kim and Kenton Oeun (who were 20 and 19 years old, respectively, at the time of the crimes). The jury rendered guilty verdicts as to Kim, but was unable to reach verdicts as to Soeur and Oeun. At a retrial in May-June 2013, the jury reached verdicts as to Soeur and Oeun. We quote portions of the background facts from our prior opinion affirming Oeun's convictions, as the evidence was presented in the same trial we are reviewing. (*People v. Oeun* (Jan. 15, 2015, B250004) [nonpub. opn.].)

"**The Party**

"On the evening of January 20, 2007, Sowalnut Pov held a twenty-first birthday party for Mai Tran, his then-girlfriend. Sowalnut and Tran lived in an apartment over the garage behind

a front house on Downey Avenue in Long Beach.[1] The party was marred by two shooting events.

"**First Shooting**

"Kim was not an invited guest, but he arrived at the ongoing party with two women, one of whom was a neighbor from across the street. Kim had prominent tattoos identifying him as an 'Asian Boyz' gang member. He introduced himself to Sowalnut as 'Baby C,' and asked if he could join the party. Sowalnut said he could stay, obtaining his agreement that he would not invite others. However, when Kim borrowed Sowalnut's phone, he was overheard saying to the person he had called, 'There's bitches over here; come over.'

"Later, a group of [about 10] others arrived at the front gate, seeking entry. A confrontation ensued, with Kim's friends trying to enter, and Sowalnut's family and friends trying to block their entry. The newcomers became more aggressive, pushing, shoving, and shouting the Asian Boyz gang identification. They then drew back from the confrontation, and began to leave the area. At that point, Kim retrieved a handgun from his companion's purse, pointed it at Sowalnut's head at close range, and asked, 'How come you didn't just let us in the party?' After stepping back and shooting three or four shots into the air, Kim left with his friends, saying he would return." (*People v. Oeun*, *supra*, B250004, pp. 2-3.) Witnesses Tuyet Nguyen and Kara Sem identified Soeur (a.k.a. "Inky") and Oeun as being among the group of Kim's friends trying to gain access to the party.

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[1] "To avoid confusion we identify the three Pov brothers, Sovanna, Sowalnut, and Sovannak, by their first names. All others are identified by their last names."

"Someone called the police, who came and told the partygoers to end the party. Most left, but a few relatives and friends stayed to help clean up.

"**Second Shooting**

"About one-half hour to one hour later, Sopheap Tath, a Pov family friend, saw three people walk toward the gate from the outside before he heard a few shots being fired from their direction. Sowalnut was in the driveway arguing with his friend Satiya Sokun about having let Kim into the party when he saw flashes of light and heard about three gunshots from outside the front gate. Sowalnut saw Sokun fall to the ground. He pulled Tran to the ground, then turned around to see his younger brother Sovannak rise from where he had been sitting, grab his shoulder, then fall to the ground while screaming to call an ambulance. Tath said that Kim and two other men fired at Sokun, and the three then ran down the street.

"Sokun was hit by 10 shots; Sovannak was shot once in the neck and chest. Both Sovannak and Sokun died at the hospital that night.

"**Shooters' Identity**

"Sowalnut, Tath, and Tran all testified that because of the low light and shadows, they could not see the shooters' faces and could give only general descriptions of those they did not know. When Tath was interviewed the next day he identified Kim as one of the shooters." (*People v. Oeun*, *supra*, B250004, pp. 3-4, fn. omitted.)[2]

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[2] We do not set forth the varying descriptions of the shooters' height and hair because the sufficiency of the evidence supporting Soeur's identity as a shooter is not at issue on appeal.

"Tran's 16-year-old sister Tuyet Nguyen and her friend Kara Sem were interviewed nearly 10 months after the January 2007 shootings. They both initially denied knowledge of anything related to the second shooting incident, saying they had left the party after the first incident. After a few hours of unrecorded police questioning, however, during which they gave inconsistent denials and stories, each provided a recorded statement admitting to having witnessed the shootings, and identifying Oeun and Soeur (who they knew) as participants in the shooting. Nguyen and Sem both said they initially had not wanted to testify out of fear of gang retribution.[3]" (*People v. Oeun*, *supra*, B250004, p. 4.) Nguyen told the police she saw Soeur fire his weapon. Sem stated she saw him holding a gun, but did not see him fire.

"Nguyen had testified at the 2008 preliminary hearing and the 2010 trial, and repeated at the 2013 trial, that her 2007 statement identifying Oeun and Soeur as shooters was fabricated, resulting from police pressure because she had been on probation, she had been under-age (and drinking at the party), and she said what she believed the police wanted to hear so she could end the questioning. She testified that she and her friends had left the party after the first shooting, and that they had not been present when the second shooting took place. Sem confirmed Nguyen's explanation that most of what she had told the police—including her identification of Oeun and Soeur as [participants in the shooting]—had been false, and that she had left the party before the second shooting had occurred.

"Tran lived out of state and was unavailable at the time of the 2013 trial. In her 2010 trial testimony, which was read to the

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[3] "Nguyen said she feared Kim, but not Oeun or Soeur."

jury, Tran confirmed that her sister Nguyen had left, at Tran's request, when the party ended after the first shooting incident. When the second shooting occurred only a small group of family and friends had remained to clean up. Tran was in the driveway near the garage in the rear when the shooting occurred. She saw flashes from the gunshots, but did not see the shooters.

"A witness who had been parked nearby shortly before midnight had seen a car driving past the Downey Street house a number of times shortly before he heard shots fired. The car he had seen might have been that of an associate of the shooters . . . , and was also similar in color and make to Oeun's car.

"**Searches of Oeun's and Soeur's Residences**

"On November 15, 2007, after both Oeun and Soeur had been arrested for murder, the police searched their residences pursuant to warrants. At Soeur's residence they found a .45-semiautomatic handgun, several boxes of ammunition, some loose live rounds, spent casings, and handgun magazines. The ammunition was of several calibers, including .45 and nine-millimeter." (*People v. Oeun*, *supra*, B250004, pp. 4-5.)

From a friend of Oeun's, police retrieved a VCR which contained a nine-millimeter Smith & Wesson pistol loaded with a magazine holding 14 bullets. Oeun's girlfriend had found the VCR with the gun inside of it at Oeun's residence after the search and had given it to the friend to hide it from police.

"**Ballistics Evidence**

"A police expert testified that three semiautomatic weapons—two .45-caliber semiautomatics, and one nine-millimeter semiautomatic—had been fired at the Downey residence shooting. Not all the casings found at the site could be identified; while the expert found no evidence that a revolver had

been used, he could not completely exclude that possibility. None of the nine-millimeter cartridge cases found at the site had been fired from the gun found in Oeun's VCR. Although none of the bullet fragments found at the scene could be positively identified as having been fired from that (or any other) particular gun, they did share the same class characteristics as the barrel rifling of the gun found in Oeun's VCR, and that gun therefore could not be ruled out as their source.

"**Gang Evidence**

"Kim was an admitted member of the Asian Boyz gang, and had one or more gang tattoos. A gang expert testified that Soeur was an admitted Asian Boyz member. The expert testified, based on Oeun's associations with Asian Boyz members, that he, too, was an Asian Boyz member." (*People v. Oeun*, *supra*, B250004, pp. 5-6.) Based on a hypothetical predicated on the facts of this case, the gang expert opined that the hypothetical crimes were committed at the direction of, in association with, and for the benefit of the Asian Boyz criminal street gang.

The jury found Soeur guilty of the first degree murders of Sokun (count 1) and Sovannak (count 2) and found gang and firearm enhancement allegations to be true as to each count. The jury also found Soeur guilty of the attempted murder of Tath (count 4) and found true the gang and firearm enhancement allegations and the allegation that the offense was committed willfully, deliberately and with premeditation. Finally, the jury found true the special circumstance allegation that Soeur was

convicted of two counts of first degree murder in the same proceeding.[4]

For each murder, the trial court sentenced Soeur to life without the possibility of parole plus 25 years to life for the firearm enhancement under Penal Code[5] section 12022.53, subdivision (b) (personally discharging a firearm causing great bodily injury or death). For the premeditated attempted murder, the court sentenced Soeur to a life term with a 15-year minimum based on the gang enhancement finding, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (b). Sentences for all offenses and enhancements were run consecutively.

DISCUSSION

I. The Trial Court Erred in Instructing the Jury It Could Find Soeur Guilty of First Degree Murder Under the Natural and Probable Consequences Doctrine, but the Error Was Harmless Beyond a Reasonable Doubt

The trial court instructed the jury on three theories of liability for first degree murder: (1) Soeur committed the murders willfully, deliberately and with premeditation, (2) he aided and abetted in the willful, deliberate and premeditated murders, and (3) he committed assaults with a firearm on the victims and should have known murder was a natural and probable consequence of the assaults.

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[4] The jury also found Oeun guilty of the offenses and found the special allegations to be true.

[5] Further statutory references are to the Penal Code.

After trial and before Soeur filed his appeal in this case, the California Supreme Court issued its opinion in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). There, the Court held "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Id*. at pp. 158-159.) The Court further held "punishment for second degree murder is commensurate with a defendant's culpability for aiding abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*Id*. at p. 166.) The Court made clear, "Aiders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Ibid*.)

The Attorney General concedes the trial court erred in instructing the jury it could find Soeur guilty of first degree murder under the natural and probable consequences doctrine, but argues the error was harmless beyond a reasonable doubt. Soeur argues the error was prejudicial, requiring reversal of the murder convictions.

"When a trial court instructs a jury on [multiple] theories of guilt, [at least] one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu*, *supra*, 59 Cal.4th at p. 167.) We must reverse Soeur's first degree murder convictions unless we conclude beyond a reasonable doubt that the jury based its verdict on a legally valid theory—that he personally committed the murders willfully, deliberately and with premeditation or he directly aided and abetted in the willful, deliberate and premeditated murders. Based on this

standard, we find the instructional error was harmless beyond a reasonable doubt.

The prosecutor's theory of the case, as argued to the jury in his opening argument, was that the evidence clearly established Soeur personally committed first degree premeditated murders. The prosecutor focused his argument on the evidence supporting Soeur's identity as one of the shooters. He briefly mentioned the natural and probable consequences doctrine, but told the jury that theory was not a key component of the case because the evidence presented about the manner of the shooting demonstrated Soeur personally committed first degree premeditated murder. Soeur's counsel also focused his argument on identity, highlighting evidence indicating the shooter was someone else.[6] He did not mention the natural and probable consequences doctrine. Nor did codefendant's counsel.

In rebuttal argument, the prosecutor stated: "Just to kind of clear away what the issues are and what the issues aren't. I don't think we heard any argument that this was anything but a coldblooded pair of murders that are first-degree murders. So I think it's clear from listening to the defense arguments, we're talking about I.D. That's the issue here. [¶] So I don't think you'll end up -- even though I spent time in my opening argument talking about the law of first-degree murder, I don't think you're going to have any doubt that these were first-degree murders. What the defense is contesting is I.D. There is no dispute we have two first-degree murders and a premeditated attempted murder. So that's all been made clear."

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[6] On appeal, Soeur does not challenge the sufficiency of the evidence establishing his identity as one of the shooters.

The jury made express findings that Soeur personally discharged a firearm causing great bodily injury or death to each of the two deceased victims. Thus, the jury found Soeur was one of three men who fired upon the victims. As described below, the circumstances of the shooting provide overwhelming evidence each shooter acted willfully, deliberately and with premeditation.

"'"Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'"'" (*People v. Young* (2005) 34 Cal.4th 1149, 1182.)

In *People v. Anderson* (1968) 70 Cal.2d 15, "the Supreme Court described the categories of evidence relevant to premeditation and deliberation that have been found sufficient to sustain convictions of first degree murder: '(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as "planning" activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" [citation]; (3) facts about the nature of the killing from which the jury could infer that the

manner of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2)."' (*People v. Concha* (2010) 182 Cal.App.4th 1072, 1084.)

"This framework does not establish an exhaustive list of required evidence which excludes all other types and combinations of evidence that may support a jury's finding of [deliberation and] premeditation [citation], nor does it require that all three elements must be present to affirm a jury's conclusion that [a deliberate and] premeditated murder was intended." (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1626; see *People v. Halvorsen* (2007) 42 Cal.4th 379, 420 [the guidelines of *People v. Anderson*, *supra*, 70 Cal.2d 15, "are descriptive and neither normative nor exhaustive, and . . . reviewing courts need not accord them any particular weight"].)

The jury heard evidence of planning. The shooters left the party and came back with loaded firearms. The jury also heard evidence of motive. The shooters were rebuffed at the entrance to the party and they took it as an affront to themselves and their gang. Finally, the evidence presented regarding the manner in which the shooting was carried out demonstrated premeditation and deliberation—three men in a coordinated effort firing multiple rounds at victims who were standing outside. Sokun suffered 10 gunshot wounds.

Given the jury's express findings that Soeur pulled the trigger, causing great bodily injury or death to each of the deceased victims, and the evidence of premeditation and deliberation arising from the circumstances of the shooting, we

find it inconceivable the jury found Soeur guilty of first degree murder under the natural and probable consequences doctrine based on his commission of an assault with a firearm. The instructional error was harmless beyond a reasonable doubt.

II. Under Current Law, the Trial Did Not Err in Instructing the Jury It Could Find Soeur Guilty of Premeditated Attempted Murder Under the Natural and Probable Consequences Doctrine

In challenging his conviction for premeditated attempted murder, Soeur applies the same argument he raised against his first degree murder convictions—that the trial court erred in instructing the jury it could find him guilty of premeditated attempted murder if it found he committed assaults with a firearm on the victims and should have known attempted murder was a natural and probable consequence of the assaults. On this issue, however, California Supreme Court precedent is squarely against his position.[7]

In *People v. Lee* (2003) 31 Cal.4th 613 (*Lee*), our Supreme Court concluded the crime of attempted murder requires "only that the murder attempted was willful, deliberate, and premeditated, but not . . . that an attempted murderer personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor." (*Id.* at p. 616.)

Later, in *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*), our Supreme Court held, "Under the natural and probable

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[7] The Attorney General argues Soeur forfeited the issue because he did not object to the jury instructions below. As Soeur points out, it would have been futile for his counsel to object because our Supreme Court already has decided this issue against the position he takes on appeal.

consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the [target offense], and the attempted murder itself was committed willfully, deliberately and with premeditation." (*Id*. at p. 880.) In *Chiu*, *supra*, 59 Cal.4th 155, discussed above, the Supreme Court distinguished *Favor* in reaching its conclusion that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine," but did not question the continued viability of *Favor*. (*Chiu*, *supra*, 59 Cal.4th at pp. 158-159.)

We are bound to follow these California Supreme Court precedents. (*People v. Johnson* (2012) 53 Cal.4th 519, 528.) Under *Lee* and *Favor*, the trial court did not err in instructing the jury on the natural and probable consequences doctrine as applied to the attempted murder count (CALCRIM No. 403). Nor did the court err in instructing the jury, "The attempted murder was done willfully and with deliberation and premeditation if either the defendant or another principal or both of them acted with that state of mind," as Soeur argues. (CALCRIM No. 601.)

Soeur also contends *Lee* and *Favor* violate the rule established in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), as extended in *Alleyne v. United States* (2013) 570 U.S. ____, 133 S.Ct. 2151, 186 L.Ed.2d 314, that a jury must determine beyond a reasonable doubt every fact that increases a defendant's punishment. Under the trial court's instructions on the natural and probable consequences doctrine, the jury decides if the nontarget offense of attempted murder was a reasonably

foreseeable consequence of the target offense (assault with a firearm), and also decides if the direct perpetrator of the attempted murder acted willfully, deliberately and with premeditation. We decline Soeur's request that we reject our Supreme Court's holdings in *Lee* and *Favor* under *Apprendi* and its progeny.[8]

In any event, any error would not be reversible under our harmless error analysis set forth above. The evidence already discussed demonstrates Soeur personally committed a premeditated attempted murder when he fired upon Tath.

III. Because the Record Does Not Demonstrate the Trial Court Gave Due Consideration to Whether Soeur's Crimes Reflected Transient Immaturity or Irreparable Corruption, We Remand for Reconsideration

In *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), the United States Supreme Court held "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" (*Id.* at p. 465.) The Court went on to

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[8] The viability of *Favor* is currently before the California Supreme Court. (*People v. Mateo* (Feb. 10, 2016, B258333, review granted May 11, 2016, S232674.) The question to be decided in *People v. Mateo*, as listed on the Appellate Courts Case Information site, is: "In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should People v. Favor (2012) 54 Cal.4th 868 be reconsidered in light of Alleyne v. United States (2013) ___ U.S. ___ [133 S.Ct. 2151] and People v. Chiu (2014) 59 Cal.4th 155?"

explain "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (*Id.* at p. 479.) A sentencing court is "require[d] . . . to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 480.) The Court noted "the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" (*Id.* at pp. 479-480.)

Subsequently, in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1360 (*Gutierrez*), the California Supreme Court evaluated the constitutionality of section 190.5, subdivision (b), in light of the principles announced in *Miller*. This statutory provision states: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." (§ 190.5, subd. (b).)[9] Prior to *Miller*, some Courts of Appeal and trial courts had construed this statutory provision "as creating a presumption in favor of life without parole as the appropriate penalty for juveniles convicted of

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[9] As set forth above, the special circumstance the jury found true in this case is that Soeur was convicted of more than one offense of murder in the first or second degree in this proceeding. (§ 190.2, subd. (a)(3).)

special circumstance murder." (*Gutierrez*, *supra*, 58 Cal.4th at p. 1360.) The Court found "no constitutional infirmity" because section 190.5, subdivision (b), "properly construed, confers discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of special circumstance murder to life without parole or to 25 years to life, with no presumption in favor of life without parole." (*Gutierrez*, *supra*, 58 Cal.4th at pp. 160-161.)

The *Gutierrez* Court concluded *Miller* "require[d] a sentencing court to admit and consider relevant evidence of the following" factors pertinent "to a sentencer's determination of whether a particular defendant is a '"rare juvenile offender whose crime reflects irreparable corruption."'" (*Gutierrez*, *supra*, 58 Cal.4th at p. 1388.) "First, a court must consider a juvenile offender's 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.'" (*Ibid.*) "Second a sentencing court must consider any evidence or other information in the record regarding 'the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.'" (*Id.* at pp. 1388-1389.) "Third, a court must consider any evidence or other information in the record regarding 'the circumstances of the homicide offense, including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him.'" (*Id.* at p. 1389.) "Fourth, a court must consider any evidence or other information in the record as to whether the offender 'might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity

to assist his own attorneys." (*Ibid.*) "Finally a sentencing court must consider any evidence or other information in the record bearing on 'the possibility of rehabilitation.'" (*Ibid.*)

In sentencing Soeur, the trial court stated:

"So I am aware that I have discretion whether to impose a life without the possibility of parole sentence on counts 1 and 2, and I have discretion to run the sentences as to 1, 2, and 4 concurrently or consecutively.

"Regarding the *Miller* factors, as specified in the California Supreme Court case of *Gutierrez*, I do understand that I am and will and am taking into account Mr. Soeur's age of 17 when the offense was committed and the features of being 17, immaturity, impetuosity, failure to appreciate risks and consequences. So I am taking that into account.

"I am taking into account, also, the family and home environment that Mr. Soeur grew up in, and when it's negative, it's often described as a negative environment that you cannot extricate yourself from. However, Mr. Soeur did not find himself in a negative home environment, [it] was not crude or dysfunctional. It was a caring family, from all appearances, parents doing their best to raise their children to be law-abiding, two siblings not involved in gangs, one did and extricated himself from that. So the argument there is that Mr. Soeur, in a like circumstance, chose that life that other juveniles in his home did not.

"The circumstances of the homicide offense, including Mr. Soeur's participation, he was a killer, as found by the jury. There were no familial pressures on him to engage in that conduct. Being a member of a gang, there obviously was gang pressure to back up other gang members, and he probably was not the

leading actor in that, one of the adults more likely was. But he was a willing and effective participant in the killings of innocent individuals who were there for a party and were killed because of gang members not allowed to enter, showing Mr. Soeur's conduct to be extremely callous.

"One factor that doesn't apply here is whether he could have been given a lesser offense but for incompetency associated with youth where a youth would not accept a lesser charge or plea bargain[; that] is not here.

"Possibilities of rehabilitation. He has the same possibilities of rehabilitation that every juvenile would have. So I do take that into account. It is probably a well known proposition that individuals in their 40's that are -- have violent background are inclined to be less violent in general.

"So I am taking all that into account. Here it's my assessment that exercising my discretion with Mr. Soeur, although a juvenile at the time of the commission of the offense, was choosing that lifestyle for its glamour and for the material benefits that that would have, and I do find that -- exercising my discretion, that life without possibility of parole is the appropriate sentence, in dealing with the horrific killing of the two individuals at the party and almost killing a third, that consecutive sentences are appropriate."

Two and a half years after the trial court sentenced Soeur, the United States Supreme Court issued its opinion in *Montgomery v. Louisiana* (2016) 577 U.S. ____, 136 S.Ct. 718, 193 L.Ed.2d 599 (*Montgomery*) and explained, after *Miller*, "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects '"unfortunate yet

transient immaturity.'" [Citations.] Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" [citations], it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [Citation.] As a result, *Miller* announced a substantive rule of constitutional law." (136 S.Ct. at p. 734.) As the Court summarized, "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." (*Ibid.*) "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." (*Id.* at p. 735.) As a result, "After *Miller*, it will be the rare juvenile offender who can receive that same sentence" of life without parole. (*Id.* at p. 734.)

Soeur, who was 17 years old at the time of the shooting, contends the trial court abused its discretion in sentencing him to life without the possibility of parole for the murders. He maintains the record of the sentencing hearing failed to establish his irreparable corruption. Based on our review of the record, we agree with the Attorney General's assessment that the trial court—which did not have the benefit of the *Montgomery* opinion at the time it sentenced Soeur—did not appear to give due consideration to whether his crimes reflected transient immaturity or irreparable corruption.[10]

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[10] The issue of whether this is a required determination for a sentencing court imposing life without the possibility of parole is currently before the California Supreme Court. (*People v. Padilla* (Oct. 25, 2016, B265614, review granted Jan. 25, 2017,

The trial court went through the *Gutierrez* factors, but did not appear to consider whether Soeur's crimes reflected transient immaturity or irreparable corruption. The court could only sentence Soeur to life without the possibility of parole if this was one of the rare cases in which the crimes reflected irreparable corruption. The record does not show the court was cognizant of the standard for the sentence it was imposing. Accordingly, we conditionally vacate the judgment and remand the matter for reconsideration to allow the court to exercise its discretion in light of the *Miller* standard as restated in *Montgomery*.[11] If, upon reconsideration, the court determines life without the possibility of parole is the appropriate sentence for the murders, it should reinstate the original judgment.

S239454.) The question to be decided in *People v. Padilla* is: "Did Montgomery v. Louisiana (2016) 577 U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599, clarify that Miller v. Alabama (2012) 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (Miller) bans a sentence of life without the possibility of parole on a specific class of juvenile offenders whose crimes reflect the transient immaturity of youth, thereby requiring that trial courts determine that the crime reflects 'irreparable corruption resulting in permanent incorrigibility' before imposing life without parole, or does a trial court comply with the constitutional mandates of Miller by giving due consideration to the offender's youth and attendant circumstances in exercising its sentencing discretion under Penal Code section 190.5, subdivision (b)?" (387 P.3d 741.)

[11] Soeur contends the trial court's imposition of a parole revocation fine was unauthorized given the sentence of life without the possibility of parole. It was. The resentencing hearing will determine whether a parole revocation fine is appropriate.

Souer argues that upon remand, a jury, not the trial court, must determine whether he should be sentenced to life without the possibility of parole. In his opening appellate brief, he asserts "the *Miller* decision effectively determined that [a] parole eligible life sentence for juvenile offenders convicted of murder should be the presumptive maximum term of confinement absent extraordinary ('uncommon') circumstances which establish the offender to be 'irreparably corrupt[].'" He maintains *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) mandates his position. We disagree. In *Cunningham*, the United States Supreme Court held California's Determinate Sentencing Law violated the Sixth Amendment because it "authorize[d] the judge, not the jury, to find the facts permitting an upper term sentence," where the middle term was "the relevant statutory maximum." (*Id*. at p. 293.) Here, life without the possibility of parole is the maximum sentence for first degree murder with special circumstances. Soeur cites no authority holding a jury must determine whether a juvenile should be sentenced to life without the possibility of parole. In *People v. Blackwell* (2016) 3 Cal.App.5th 166 (*Blackwell*), the Court of Appeal concluded the trial court may impose a sentence of life without the possibility of parole, after excising its discretion in considering whether the crimes reflect transient immaturity or irreparable corruption, without running afoul of the constitutional principles addressed in *Apprendi* and *Cunningham*. (*Blackwell*, *supra*, 3 Cal.App.5th at pp. 182-195.) We agree with the court in *Blackwell*.

IV. Imposition of the Firearm Enhancement Under Section 12022.53, Subdivision (d) Was Proper

Soeur contends the trial court's imposition of the firearm enhancement under section 12022.53, subdivision (d) violated the

multiple conviction rule and the Double Jeopardy Clause because "the factual element essential to establishing that particular enhancement in order to increase the maximum punishment on the underlying murder by an additional 25 years-to-life is necessarily subsumed within the elemental components of the murder – the proximately caused death of the victim."

Again, Soeur asks us to ignore California Supreme Court precedent, which we may not do. In *People v. Sloan* (2007) 42 Cal.4th 110, our Supreme Court held enhancement allegations may not "be considered for purposes of the rule prohibiting multiple convictions based on necessarily included offenses." (*Id.* at p. 113.) In *People v. Izaguirre* (2007) 42 Cal.4th 126 (*Izaguirre*), the Court rejected the defendant's argument that under *Apprendi*, "as interpreted by [the California Supreme Court] in *People v. Seel* (2004) 34 Cal.4th 535 . . . in the context of federal double jeopardy jurisprudence, enhancements must be treated as legal elements under the multiple conviction rule." (*Izaguirre*, *supra*, 42 Cal.4th at p. 128.) *Apprendi* requirements are met where firearm enhancements are submitted to the jury and found true beyond a reasonable doubt, as occurred in Soeur's case. (*Izaguirre*, *supra*, 42 Cal.4th at p. 131.) The *Apprendi* "rule is compelled by the federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment. [Citation.] It is not grounded on principles of federal double jeopardy protection." (*Izaguirre*, *supra*, 42 Cal.4th at p. 131.) Double jeopardy is not implicated here because the murder convictions and true findings on the firearm enhancement allegations occurred in a unitary trial and not a second prosecution. (*Id.* at pp. 133-134.) We have no cause to disagree

with these California Supreme Court decisions, as Soeur requests we do.

The trial court's imposition of the firearm enhancements under section 12022.53, subdivision (d) was proper under prevailing law.

DISPOSITION

The judgment is conditionally vacated and the matter remanded for reconsideration consistent with this opinion. If, upon reconsideration, the court determines life without the possibility of parole is the appropriate sentence for the murders, it should reinstate the original judgment.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.